Noor Famiza bte Zabri & Anor v Awang bin Muda & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO 21-02-92(89)
ABDUL MALIK ISHAK JC
31 DECEMBER 1993

Tort *— Negligence — Res ipsa loquitur — Whether doctrine applicable where cause of accident known*

Civil Law Act *— Fatal accident — Loss of future earnings — Deduction of deceased's living expenses — Civil Law Act 1956 s 7(3)(iv)(c)*

Civil Law Act *— Negligence — Damages — Personal injuries — Cerebral concussion — Abrasion — Soft tissue injury — Civil Law Act 1956*

Civil Law Act *— Negligence — Damages — Personal injuries — Four-year-old boy — Pain on right cheek*

The plaintiffs and the first defendant were involved in a road accident in which the first plaintiff's husband ('the deceased') was killed. The first defendant was driving the military truck which collided with the plaintiffs' car as servant or agent of the second defendant. The plaintiffs claimed, inter alia, for the deceased's loss of earnings and for their injuries. According to the evidence, the accident took place on the plaintiffs' side of the road and the plaintiffs relied on the doctrine of res ipsa loquitur. The defendants, however, pleaded that the deceased had contributed to the accident.

Held, allowing the plaintiffs' claim:

(1) The doctrine of res ipsa loquitur is not a principle of substantive law but a rule of evidence. In this case, the plaintiffs' car was on its correct side of the road at the material time and for the accident to have occurred simply meant that there was encroachment by the first defendant into the path of the plaintiffs' car. It follows therefore that negligence should be placed entirely on the first defendant. As the negligence of the defendants was established, the doctrine of res ipsa loquitur did not apply.

(2) The plaintiffs' claim for special damages was not granted as they had failed to prove them strictly. However, as agreed between both parties, RM134 was granted for the purchase of police and medical reports. Interest was granted at 4%pa from the date of accident until the date of judgment and thereafter at 8%pa until realization.

(3) The first plaintiff, as the spouse of the deceased, was granted RM10,000 for bereavement under s 7(3A) read with s 7(3B)(a) of the Civil Law Act 1956 ('the Act').

(4) In assessing the loss of earnings, the court took into account the living expenses of the deceased at the time of his death. The evidence showed that the deceased was earning RM1,100 per

month and that he purchased two or three shirts a year at RM90 per year. Monthly, the deceased would therefore utilize about RM10. Thus, the figure would be: RM1,100 - RM10 = RM1,090 per month. The multiplier would be dependant on s 7(3)(iv)(d) of the Act and, as the deceased was 35 years of age at the time of his death, the multiplier was 10. Therefore, the loss of earnings awarded was RM130,800.

(5) As for the first plaintiff's injuries, the court awarded RM1,500 for cerebral concussion; RM300 for the 2cm-long abrasion on her cheek; and RM300 for the soft tissue injury.

(6) The second plaintiff, a boy of four years of age, was awarded RM500 for pain on his right cheek.

(7) Interest on general damages was awarded at 6%pa from the date of filing to the date of judgment.

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan pertama telah terlibat dalam suatu kemalangan jalanraya di mana suami plaintif pertama ('si mati') telah terbunuh. Defendan pertama memandu lori tentera yang berlanggar dengan motokar plaintif sebagai kakitangan atau ejen defendan kedua. Plaintif menuntut, antara lain, kehilangan mata pencarian si mati dan untuk kecederaan mereka. Menurut keterangan, kemalangan itu berlaku di jalan laluan plaintif dan plaintif bergantung pada doktrin res ipsa loquitur. Defendant, sebaliknya, menyatakan bahawa si mati telah menyumbang kepada kemalangan itu.

Diputuskan, membenarkan tuntutan plaintif:

(1) Doktrin res ipsa loquitur bukanlah suatu prinsip undang-undang substantif tetapi merupakan suatu rukun keterangan. Di dalam kes ini, motokar plaintif berada pada belahnya yang betul pada masa material dan hakikat bahawa kemalangan itu berlaku bermakna terdapat pencerobohan oleh defendan pertama ke laluan motokar plaintif. Oleh itu, kecuaian seharusnya diletakkan sepenuhnya pada pihak defendan pertama. Oleh kerana kecuaian defendan telah ditunjukkan, doktrin res ipsa loquitur tidak terpakai.

(2) Tuntutan plaintif untuk ganti rugi khas tidak dibenarkan kerana mereka gagal membuktikannya secara ketat. Bagaimanapun, seperti yang dipersetujui di antara kedua-dua pihak, RM134 dibenarkan untuk pembelian laporan polis dan perubatan. Faedah dibenarkan pada kadar 4% setahun dari tarikh kemalangan hingga tarikh penghakiman dan seterusnya pada 8% setahun hingga ianya dibayar.

(3) Plaintif pertama, sebagai isteri si mati, dibenarkan RM10,000 untuk 'bereavement' di bawah s 7(3A) dibaca dengan s 7(3B)(a) Akta Undang-Undang Sivil 1956 ('Akta itu').

(4) Apabila mentaksirkan kehilangan mata pencarian, mahkamah mengambil kira perbelanjaan kehidupan si mati pada masa kematiannya. Keterangan menunjukkan bahawa si mati mendapat RM1,100 sebulan dan bahawa beliau membeli dua atau tiga helai

kemeja setahun pada harga RM90 setahun. Sebulan, si mati menggunakan lebih kurang RM10. Oleh itu, jumlahnya adalah: RM1,100 - RM10 = MR1,090 sebulan. Multiplier itu bergantung kepada s 7(3)(iv)(d) Akta itu, dan oleh kerana si mati berumur 35 tahun pada masa kematiannya, multiplier itu adalah 10. Dengan itu, RM130,800 diawardkan untuk kehilangan mata pencarian.

(5) Bagi kecederaan plaintif, mahkamah mengawardkan RM1,500 untuk konkusi serebrum; RM300 untuk lelasan sepanjang 2cm di pipinya; dan RM300 untuk kecederaan tisu lembut ('soft tissue injury').

(6) Plaintif kedua, seorang kanak-kanak berumur empat tahun, diaward RM500 untuk kesakitan di pipi kanannya.

(7) Faedah atas ganti rugi am diaward pada kadar 6% setahun dari tarikh tindakan difailkan hingga tarikh penghakiman.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 01–07–94.]

Notes

For cases on res ipsa loquitur, see 12 *Mallal's Digest* (4th Ed) paras 383–391.

For cases on damages in fatal accidents, see 1 *Mallal's Digest* (4th Ed) paras 1791–1813.

For a case on damages for personal injuries, see 1 *Mallal's Digest* (4th Ed) para 1825.

Cases referred to

1 *Marshall v Owners of SS Wild Rose & Anor* [1910] AC 486 (folld)
2 *Ng Chui Sia v Maimon bte Ali* [1983] 1 MLJ 110 (folld)
3 *Koay Teik Choo & Ors v R* [1956] MLJ 52 (folld)
4 *Lai Kuit Seong v PP* [1969] 1 MLJ 182 (refd)
5 *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392; [1950] AC 185 (folld)
6 *Blay v Pollard and Morris* [1930] 1 KB 628 (folld)
7 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 (refd)
8 *Jefford v Gee* [1970] 2 QB 130; [1970] 1 All ER 1202; [1970] 2 WLR 702 (refd)
9 *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774; [1980] AC 136; [1978] 3 WLR 955 (refd)
10 *Harris v Empress Motors Ltd* [1983] 3 All ER 561; [1984] 1 WLR 212 (refd)
11 *Chua Leh Choo & Anor v Mohd Noor bin Ibrahim & Ors* [1988] 2 MLJ xxxi (folld)
12 *Eiap Teng Siyum v Mohd Noor bin Ibrahim & Anor* [1988] 2 MLJ xxx (folld)
13 *Abdullah bin Ahmad v Cheng Meng Chee* [1988] 1 MLJ xxxvii (refd)
14 *Lam Len Chen v Sim Hee Tien* [1985] 2 MLJ cxcii (refd)

Legislation referred to

Civil Law Act 1956 s7(3)(iv)(d)

Abdul Malik Ishak JC: At about 10.30pm on 3 May 1989, there was an accident at the 41½ milestone, Jalan Ipoh Lenggong, Kati, Kuala Kangsar road involving motor car JAL 1154 and military truck ZA 4859. As a result of the accident, the driver of the motor car sustained injuries and died of a fractured skull. Two other passengers in the motor car survived, both sustaining injuries. The driver of the motor car was Saharudin bin Omar and the two passengers were his wife and son known as Noor Famiza bte Zabri and Bazrul Ozair bin Saharudin respectively. The military truck was driven by the first defendant as servant or agent of the second defendant. There was a passenger in the military truck, who sat in front, by the name of Saad bin Yahya.

According to the first plaintiff, she was accompanying her late husband together with her four-year-old son in the motor car, on that fateful night, to Kuala Kangsar from her house at Kubang Halban to witness the 'pelita panjut'. They started at 8.30pm and on their way they stopped at the first plaintiff's mother's house at Lubok Merbau. At about 10pm they decided to return home and it was on their way home that the accident occurred. The first plaintiff stated that while they were on their way home, they changed their minds and decided to go to the first plaintiff's grandfather's house at Kampong Kati. But upon arrival at the vicinity of the first plaintiff's grandfather's house, they discovered that the house was dark and so they decided to proceed home. The motor car, at the material time, was facing the direction of Lenggong and travelling slowly on its correct side of the road, more to the left edge at a point marked in red as 'X' by the first plaintiff. She then saw a vehicle coming from the opposite direction, encroaching and colliding into the motor car driven by her late husband. She categorically stated that at the time of collision, the motor car did not cross the broken centre white line.

Sergeant 55442, Ishak bin Ibrahim (SP2), the investigating officer, testified for the plaintiffs. He stated that he arrived at the scene at 10.45pm on the night in question. Having ascertained that the driver of the motor car had been sent to the hospital and that there were no traffic jams at the scene, he then proceeded to draw a rough sketch plan (agreed bundle marked 'C' at pp 1 and 2). He elaborated on the rough sketch plan and stated that glass fragments were found at point 'L'. There were scratch marks on the road at point 'W' and the military truck ploughed through banana, durian and rambutan trees and stopped dead in its tracks to the right side of the road as one faces Kuala Kangsar, leaving tyre marks therein. The military truck also demolished a telecommunications iron post leaving a short stump as a grim reminder of an ugly episode. SP2 also testified that the front right door of the motor car was dented, torn off and landed at 'M'. That stretch of road where the accident took place was straight and there were no obstacles or pot-holes on the road. The road was well tarred. This witness (an investigating officer ('IO') of three months' standing) rounded up his evidence by stating that he thought that the accident took place at points 'L' and 'W' in the sketch plan.

The first defendant, in his evidence, stated that he was driving the military truck laden with items from the store proceeding from Kampong Kenayang Grik to Lasah Camp at Seremban. Seated next to him was Saad

bin Yayha (SD2). The nine-ton military truck was travelling at 50km per hour in a convoy. He stated that before the accident, he first saw a motor car with its low lights at a distance of 200m and reacted by reducing his speed. He corrected the movement of his military truck and proceeded ahead not realising that an accident would occur. He stated that the military truck came into contact with the motor car in a glancing blow ('tergesel'). There was a loud noise. He panicked and failed to press his brakes thereby causing the military truck to swerve to the right. In short, he lost control of the military truck and rammed into a telecommunications iron post and fruit trees. He stated that the road was straight as indicated in the sketch plan with no pot-holes at all.

Saad bin Yahya, DW2, in his evidence, said almost the same thing in his description of how the accident took place. He stated that before the accident, he saw the motor car about 20m from the military truck in the opposite direction. There were no signs to indicate that an accident would occur. The motor car had its headlights on. He felt that the military truck was travelling at 50km per hour. According to DW2, after he heard a loud noise, he realised that an accident had happened. He admitted conversing with the driver. Though he admitted that the conversation would affect the driver's concentration while driving, yet he was adamant in saying that the conversation would prevent the driver from feeling lethargic as they had just broke their fast.

It is now trite law that the onus of proving negligence on the part of the defendant is on the plaintiff. In *Marshall v Owners of SS Wild Rose & Anor*[1] at p 487, Lord Loreburn LC had this to say:

> Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premisses. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved.

Nearer home is the case of *Ng Chui Sia v Maimon bte Ali*[2] where Hashim Yeop Sani J (as he then was) said at p 100 col 2I:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.

It is also pertinent to point out that the trial court should not approach a case on the basis of deciding which of the two conflicting versions should be believed but rather on the basis of considering which version is inherently probable or improbable (*Koay Teik Choo & Ors v R*[3]). With these principles in mind, I shall now assess the evidence in the present case.

In the statement of claim, it was alleged that the deceased was lawfully driving his motor car on his own proper side of the road when the military truck driven along its wrong side collided into him. The defence was that,

as set out in the statement of defence, there was a collision between the two vehicles and that the deceased contributed to the accident. A

The first and crucial question to ask was whether or not the deceased had in truth driven his motor car on his correct side of the road and, as alleged by the defence, that the deceased had contributed to his own misfortune.

As proof of the first defendant's negligence, counsel for the plaintiffs relied on the doctrine of res ipsa loquitur, and the said doctrine was so pleaded in the statement of claim. I am sceptical and I do not think that, on the pleadings and the evidence adduced on both sides, the doctrine has any application in this case. Ong CJ in *Lai Kuit Seong v PP*[4] explained the doctrine in this way: B C

> ... [the doctrine] does not apply where the cause of the accident is known ... the res speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened ... conversely, res ipsa loquitur cannot be relied on where the res is ambivalent. D

It has to be borne in mind that the doctrine is not a principle of substantive law but a rule of evidence. In *Barkway v South Wales Transport Co Ltd*[5] at p 399, Lord Normand had this to say:

> The maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. E

In another part of the judgment, Lord Normand had this to say: F

> It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maxim res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury.

In *Barkway*'s case,[5] the House of Lords held that as the cause of the accident was known res ipsa loquitur did not apply, but that on the facts the negligence of the defendants was established. In my judgment, that is exactly the position in the present case. G

Noor Famiza recounted the events prior to the accident rather vividly. She was categorical in stating that her late husband drove the motor car slowly, more to the left side of the road as one faces Lenggong. She proceeded, without hesitation, to mark with a red ball-point pen on the rough sketch plan point 'X' indicative of the location of the motor car. This factor must be weighed in the light of her evidence that the car slowed down as they were nearing her grandfather's house. She could see that her grandfather's house was dark and this fact would correlate with her version that her late husband drove the motor car slowly. Had her late husband was speeding at that point of time, she could not have made out nor ascertained that her grandfather's house was dark. H I

A The sketch plan drawn by the investigating officer serves a useful purpose, for from it certain inferences can be drawn to formulate the plaintiffs' case of negligence against the first defendant. Now, the glass fragments located on the plaintiffs' correct side of the road would undoubtedly show that the first defendant had encroached into the path of the deceased. The first defendant must have sped as the damage to the motor car was extensive and B the tyre marks of the military truck measure 51.8m. Even the right-hand door of the motor car came off and landed some distance away from the motor car. The photograph of the motor car (see the supplementary agreed bundle of documents at 'C1'), taken by the government chemist showing the front and offside view of the motor car, shows the extent of the damage C as a result of the accident. In his brief report, the government chemist concluded that 'the motor truck and motor car did come into collision with one another'.

But the defendants sought to establish, departing as they did from their pleadings, that both vehicles merely came into contact with one another in a glancing blow ('tergesel'). A glancing blow as alleged by the first defendant D would run counter to, first, the extensive damages incurred by the motor car and the consequential death of the deceased, and secondly, the opinion of the government chemist that both vehicles collided with one another and not glanced off one another. It seems, from the tenor of the first defendant's evidence, he was trying to reconcile his evidence with his police report E which stated that both vehicles 'seliseh' only. But he forgot, in so doing, that the statement of defence averred that there was a collision. It is now trite law that the purpose of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate. In short, a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are F amended (*Blay v Pollard and Morris*[6] at p 634).

The accident happened during the fasting month. The first defendant was driving continuously (except for a short break in order to break his fast) for approximately six hours. During the early part of the journey, the first defendant and the rest of the convoy had to go through muddy terrain and G the first defendant's military truck got stuck in the mud. It is reasonable to infer that the first defendant must be tired that night. Even his fellow passenger, Saad bin Yahya (SD2), agreed that he spoke to the first defendant to prevent lethargy. In that atmosphere, the first defendant saw, some 200m away, the lights of the motor car from the opposite direction. He said he quickly reduced his speed and controlled his military truck. Now, if the H first defendant did what he said he did, the two vehicles would not have collided with one another. The motor car was on its correct side of the road at the material time. To enable the collision to occur would simply mean that there was encroachment by the first defendant into the path of the motor car. That must have been and the only probable conclusion that can I be deduced from the available evidence. It follows therefore that negligence should be placed entirely on the first defendant.

It has been submitted that Saad bin Yahya (SD2) gave almost exactly the same evidence as the first defendant. But I venture to say boldly that passengers are not expected to be paying close attention to the driving of the

vehicle. In an emergency, passengers are not expected to say with certainty the position which the moving vehicle was occupying at a given moment of time. This observation equally applies to Saad bin Yahya. For example, Saad bin Yahya saw the motor car about 20m from the opposite direction and then he heard a loud noise. He could not say positively, one way or the other, as to how the accident occurred. In the face of the report of the government chemist, Saad bin Yahya could not have said more than that.

The first defendant, an inexperienced driver of four months' standing knew that he was driving a nine-ton military truck, a heavy vehicle. Yet when the collision occurred, he panicked and failed to control nor brake the military truck. Under such circumstances, the question of contributory negligence does not arise as the first defendant has no right to complain when it was he who placed the deceased in that situation depriving the deceased of the opportunity to take reasonable steps to prevent the collision. I therefore hold the first defendant wholly liable.

Special damages

It is now trite law that the onus is on the plaintiff to prove special damages strictly. In *Admiralty Commissioners v SS Susquehanna*,[7] Viscount Dunedin lucidly stated [at p 661] that, 'If there be any special damage which is attributable to the wrongful act, that special damage must be averred and proved and, if proved, will be awarded.'

The plaintiffs sought expenses incurred for funeral services, damage to clothing and the transportation charges but these items were not granted as the plaintiffs failed to prove them strictly. However, as agreed between both parties, RM134 was granted for the purchase of police and medical reports.

On the question of interest on special damages, my attention was drawn to *Jefford v Gee*[8] to the effect that special damages may be fairly averaged out at half the usual rate of interest from the date of accident to the date of judgment. Now, applying the conventional rate of interest permitted by our courts, ie 8%pa, therefore, the correct rate payable on special damages in the present case, must be at 4%pa from the date of accident until the date of judgment and only thereafter would the plaintiffs be entitled to 8%pa until realization.

Bereavement

I would allow the claim for damages for bereavement under s 7(3A) read with s 7(3B)(a) of the Civil Law Act 1956 ('the Act') for the spouse of the deceased at RM10,000.

General damages

Under general damages, I took into account that the deceased was a schoolteacher earning a monthly salary of RM1,065 plus an allowance ('elaun khidmat awam') of RM45 per month. This would come to RM1,100 per month. Now, under s 7(3)(iv)(c) of the Act, in assessing the loss of earnings, the court shall take into account any diminution of any such amount as is proved to be the living expenses of the deceased at the time of

his death. In the course of assessing the damages under this head, the speech of Lord Salmon in *Pickett v British Rail Engineering Ltd*[9] immediately comes to mind. Lord Salmon had this to say [at p 784], and I quote, 'The assessment of these living expenses may, no doubt, sometimes present difficulties but certainly no difficulties which would be insuperable for the courts to resolve ...'.

From the available evidence, and bearing in mind that the ingredients that go to make up living expenses are the same and would apply equally whether the victim be young or old, single or married, with or without dependants, I took into account the relevant evidence that the deceased purchased two or three shirts a year at RM90 per year (RM30 x 3 shirts). Monthly, the deceased would therefore utilize RM7.50 (rounded off at RM10 per month). Thus, the figure would be: RM1,100 - RM10 = RM1,090 per month.

This method of calculation is perfectly legitimate. It is now established that the sum to be deducted as living expenses is based on the proportion of the victim's net earnings which he spent to maintain himself at the standard of life appropriate to his case and any sums expended to maintain others do not form part of the victim's living expenses and should not, consequently, be deducted from the net earnings (see *Harris v Empress Motors Ltd*[10] especially at p 228). The multiplier to be adopted would be dependant on s 7(3)(iv)(d) of the Act:

> ... in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

The deceased was 35 years of age at the time of his death, thus: 55 - 35 = 20 ÷ 2 = 10 years. By simple arithmetic, using 10 as a multiplier, the result would be (RM1,090 x 12 months) x 10 years = RM130,800 for loss of earnings.

The first plaintiff sustained the following injuries:

(a) cerebral concussion. I would award RM1,500 for this injury on the authorities of *Chua Leh Choo & Anor v Mohd Noor bin Ibrahim & Ors*[11] and *Eiap Teng Siyum v Mohd Noor bin Ibrahim & Anor*;[12]
(b) abrasion 2cm long on her right cheek. For this injury, I would award RM500 taking into account the inflationary rate and by comparing with *Abdullah bin Ahmad v Cheng Meng Chee*[13] where sum of RM300 was awarded for an abrasion on the right temple; and
(c) soft tissue injury. A sum of RM300 would be awarded.

I would award the second plaintiff, a young boy of four years of age, RM500 for pain over his right cheek on the authority of *Lam Len Chen v Sim Hee Tien*[14] where a sum of S$500 was awarded for concussion, abrasion of the face and haematoma.

Finally, I award interest for general damages at the rate of 6%pa from date of filing of the suit to date of judgment.

Order accordingly.

Reported by Anne Khoo